Wayne Construction, Inc. and Edward Lewis Charland. Case 19-CA-12610

December 7, 1981

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On July 17, 1981, Administrative Law Judge William J. Pannier III issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Wayne Construction, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT interrogate our employees regarding the union sympathies and activities of their coworkers.

WE WILL NOT threaten to close down our construction projects before allowing our employees to become unionized.

WE WILL NOT discharge or otherwise discriminate against our employees because they attempted to become unionized.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights as set forth above, which are guaranteed by Section 7 of the National Labor Relations Act.

WE WILL make whole Edward Lewis Charland for any loss of pay he may have suffered as a result of our unlawful termination of him on June 24, 1980, with interest on the amount owing.

WAYNE CONSTRUCTION, INC.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge: This matter was heard by me in Juneau, Alaska, on May 5, 1981. On September 4, 1980, the Acting Regional Director for Region 19 of the National Labor Relations Board issued an order consolidating cases, consolidated complaint and notice of hearing, based on unfair labor practice charges, the one in Case 19-CA-12610 having

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products. Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In sec. III,B, par. 2 of his Decision, the Administrative Law Judge found that Respondent's failure to call its co-owner, Arntzen, to corroborate the testimony of Jeffords concerning a promise of a job to Charland, purportedly made by Arntzen, supported a fair inference that, had Arntzen been called as a witness, his testimony concerning that matter would not have supported that of Jeffords. However, we find that, since there is no basis for inferring that Arntzen was not equally available to be called as a witness by both Respondent and the General Counsel, no adverse inference can be drawn against Respondent with respect to its failure to call him to corroborate Jeffords' testimony. Plumbers and Steamfitters Local No. 40, United Association of Journeymen and Apprentices of Plumbers and Pipefitting Industry of the United States and Canada, AFL-CIO (Mechanical Contractor Associations of Washington), 242 NLRB 1157, 1160, fn. 10 (1979). This finding, however, does not affect our decision to affirm the Administrative Law Judge's discrediting of Jeffords' testimony, as the other factors cited by the Administrative Law Judge, including Jeffords' demeanor and the contradiction of his testimony by neutral witses, are sufficient grounds to support his credibility resolutions.

² In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

¹ Unless otherwise stated, all dates occurred in 1980.

been filed on July 18,² alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq., herein called the Act. All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record and the briefs filed on behalf of the parties and upon my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Wayne Construction, Inc., herein called Respondent, has been a State of Washington corporation, with an office and place of business in Seattle, Washington, engaged in the business of construction contracting in the States of Alaska and Washington. During the 12-month period prior to issuance of the complaint, a representative period, Respondent, in the course and conduct of its business operations, derived gross revenue in excess of \$500,000 and, during that same period, sold and shipped goods or provided services valued in excess of \$50,000 from its facilities within the State of Washington directly to customers outside of that State and, also, to customers within the State of Washington who were themselves engaged in interstate commerce by other than indirect means. Therefore, I find, as admitted by Respondent, that at all times material herein it has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

At all times material herein, Teamsters Local 959, State of Alaska, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; International Union of Operating Engineers, Local 302, AFL-CIO; and Laborers' International Union of North America, Local 942, AFL-CIO, have each been labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The facts giving rise to the complaint in this matter occurred on Metlakatla Island, herein called the Island, which is owned and controlled by native Alaskans. In order for a non-native to reside or work there, a permit must be obtained from the 12-person council, which establishes policy for the Island. From early summer 1979 until late October 1980, Respondent was working on the Island, constructing a breakwater. To do this, Respondent employed truckdrivers who hauled rock to the water from a quarry located 5 or 6 miles away from the breakwater location. Edward Lewis Charland was one of those truckdrivers whom Respondent employed. He

worked from March 3 until June 24, when the General Counsel alleges that he had been terminated unlawfully and, conversely, when Respondent contends that he had quit by walking off the job. The only other dispute in this case centers on whether Donald R. Jeffords, the superintendent for the project, had made certain statements on June 24 that constituted an unlawful interrogation and a threat to shut down the jobsite.

In late April or early May, oiler Jeff Staples had been given authorization cards. While he did not distribute them, Staples testified that after he had obtained them Jeffords had said, "[W]ell, I see your friend from the Union was here," and had warned, "[W]ell, if I hear anybody talking union around here, they're fired." In mid-June, Charland obtained the cards from Staples and began distributing them himself.

On June 24, Charland reported for work at 7 a.m. and began hauling rock from the quarry to the site where the breakwater was being constructed. At approximately 9 a.m., as he drove by Respondent's office, Jeffords flagged him down. After parking the truck, Charland entered the office. Only he and Jeffords were present during this conversation. Charland testified that Jeffords began cursing at him and accusing him of being sneaky and of "going behind [Jeffords'] back with these cards." According to Charland, Jeffords had said that the council's registrar, Rosabel Nelson, was going to pull Charland's permit because he had received too many tickets, adding that going behind his back had been the wrong thing to do and that he would close down the job before going union. Then, testified Charland, Jeffords had said that Charland was "through for good, we've got ways of taking care of things like this."

Jeffords agreed that this conversation had occurred and that, during it, the subject of the organizing campaign had been discussed. However, he denied that this had been his purpose for summoning Charland to the office that day. Rather, he testified that he had done so to discuss certain problems involving Charland's "work habits, his driving habits, and some living conditions that we previously discussed." According to Jeffords, imme-

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² Three other cases, Cases 19-CA-12678, 12679, and 12701, also were originally consolidated in this matter. At the hearing, I granted the General Counsel's motion to sever those three cases, dismiss the complaints, and remand the charges to the Regional Director for final disposition.

³ It is admitted that at all times material herein Jeffords had been a supervisor within the meaning of Sec. 2(11) of the Act and an agent of Respondent.

⁴ Jeffords admitted having discussed the matter of organizing Respondent's employees with Staples, testifying he had said that the proper way to do this would be to get all the employees together and to discuss it as a group, rather than cause rumors by doing so on an individual basis. However, he did not deny having threatened that employees who talked about unions would be fired. Counsel for the General Counsel represented that the purpose for introducing this evidence was solely "to show the union animus by respondent [sic], just for background only," and disavowed any intention or desire to seek a remedial order based on Jeffords' comments during this conversation.

⁵ Jeffords testified that, during the time that Charland had been driving Respondent's blue Peterbilt truck, Charland had been "responsible for breaking a drive line, a transmission, a rear-end, and some U-joints, either directly or indirectly." Jeffords also testified that he "had had some complaints through the chief of police pertaining to rock being scattered on the road" and that lead truckdriver Blaine Gormley had reported that Charland had been "powering into the corner" by the council chambers, thereby causing his truck to tip sufficiently to scatter some of the rock being transported. Finally, testified Jeffords, there had been an earlier occasion when, as a result of some bad checks that the mayor had reported

diately upon entering the office Charland had said "I know immediately what you're going to do . . . you're jumping me over this union thing." Jeffords testified that he had denied that this had been his purpose for summoning Charland to his office, but had said that since Charland wanted to discuss it, "[L]let's get that out of the way first before we go any further." Then, testified Jeffords, he had told Charland essentially the same thing as he assertedly had told Staples earlier: that all of the employees should be involved in the decision concerning unionization and that the proper method for arriving at a decision regarding the matter was to convene a meeting of all employees to consider it, instead of creating problems by approaching only certain selected employees during working hours.

Jeffords testified that following these remarks he had attempted to discuss other subjects with Charland. Thus, according to Jeffords, he had said that there were rumors that Charland's work permit was going to be revoked, that the continuing damage to the Peterbilt truck would have to cease, that Charland would have to stop scattering rocks, and that Charland had made a misrepresentation about having been promised a job by Donald Arntzen, Jeffords' immediate superior, when he had applied for employment to Jeffords. 6 However, testified Jeffords, Charland had kept interrupting, returning to the subject of the organizing campaign and accusing Jeffords of "trying to railroad him." Jeffords testified that ultimately he had told Charland that "if he didn't get down there and square it away they was [sic] going to pull his permit," and that Charland had "just busted out the door and that's the last I saw of him."

Staples testified that before he had arrived for work on June 24, at his normal starting time of 11:30 a.m., he had been told by Charland and another truckdriver that Charland was no longer working for Respondent. He further testified that when he arrived for work that day he had been summoned to the office where Jeffords had said, "First of all, I want to tell you Ed wasn't fired because of the union, the town had pulled his work permit because of too many speeding tickets." According to Staples, Jeffords then asked who was involved in the unionizing campaign, but, notwithstanding Jeffords' efforts to persuade him to do so, Staples had declined to identify them.

Jeffords agreed that this conversation had taken place. He testified that he had said that he had been hearing rumors that he had fired Charland but that "I didn't fire Ed Charland for union activities. And I didn't even tell him he was fired, I told him to go down to the city and square his permit away. And I want you to understand,

Jeff, that your job is not in jeopardy, nobody's job is in jeopardy here because of union activities."⁷

Finally, Acting Police Chief Doug Askren testified, without contradiction by Jeffords, that in June he had been told by Jeffords that "due to [Charland's] driving record and his involvement in driving habit complaints that he had, that he was letting him go on that pretense. Then the statement was made to me that he was also involved in some union activity."

B. Analysis

The threshold question here is whether, as the General Counsel contends, Charland had been discharged or whether, as Respondent contends, he had quit. As set forth above, Charland testified that, during the June 24 conversation, he had been told by Jeffords that he was "through for good" Such words, if spoken, "would logically lead a prudent person to believe his tenure had been terminated" Fred I. Putnam v. Harry C. Lower, 236 F.2d 561, 566 (9th Cir. 1956); accord: N.L.R.B. v. Trumbull Asphalt Company of Delaware, 327 F.2d 841, 843 (8th Cir. 1964), and cases cited therein.

While Jeffords claimed, as also set forth above, that Charland simply had walked out of the office on June 24 and had never returned, thereby effectively having quit employment with Respondent, a number of factors warrant the conclusion that Jeffords should not be credited. When he testified, Jeffords did not appear to be doing so in a candid fashion. He did not deny having told Askren that Respondent was "letting [Charland] go," which is, of course, an admission of the very fact that he had denied when he testified in this proceeding. In another area, Jeffords claimed that he had discussed the matter of pulling Charland's work permit with both the chief of police and with Mayor Stanley R. Patterson. Each of them, however, denied categorically ever having told Jeffords that Charland's work permit was going to be revoked. Jeffords claimed that on Monday, June 23, while outside the mayor's office, Chief of Police Askren had complained about Charland scattering rocks on the road. Askren denied having discussed Charland with Jeffords after a mid-May meeting between Askren and all of Respondent's drivers. In another area, while Jeffords claimed that Arntzen, Jeffords' superior, had reported a misrepresentation by Charland, regarding a promise of a job to Charland purportedly made by Arntzen, Arntzen was never called to confirm either that he had made such a report to Jeffords or that he had not made such a promise to Charland. Nor did Respondent claim that Arntzen was unavailable to it as a witness. Accordingly, it is a fair inference that had Arntzen been called as a witness, his testimony concerning these matters would not have supported that of Jeffords. Colorflo Decorator Products, Inc., 228 NLRB 408, 410 (1977), enfd. by memorandum opinion 582 F.2d 1289 (9th Cir. 1978); Martin Luther King, Sr., Nursing Center, 231 NLRB 15, fn. 1 (1977). Jeffords' complaints regarding Charland's

that Charland had written to pay his rent, Jeffords had agreed to permit Charland to move his motor home to Respondent's camp facilities, but when Jeffords had heard that the motor home had no bathroom, he had decided to notify Charland that he had changed his mind.

⁶ Jeffords claimed that he had learned that Arntzen had made no such promise a few days prior to the June 24 confrontation. However, Jeffords conceded that "when I originally called him in there I wasn't even thinking of {that} misrepresentation, I was thinking basically of the rock on the road and the housing situation."

⁷ Jeffords also testified that he had told Staples, with regard to Charland's departure, "I want to squelch any rumors that started right now."

purported abuse of the Peterbilt truck were not corroborated. Indeed, they were refuted, for the most part by Staples who had been one of the two individuals responsible for maintaining and repairing Respondent's vehicles. If, as Jeffords claimed, he had been concerned with "squelching" rumors before they got started, it does not seem likely that he would have spoken only to Staples concerning his June 24 confrontation with Charland. In sum, I do not credit Jeffords and, accordingly, I conclude that Charland had been discharged by Respondent on June 24.

This, then, leads to consideration of the motivation for Charland's discharge. It is undisputed that Charland had begun distributing authorization cards on approximately June 16. Moreover, Staples testified, credibly and without contradiction, that earlier he had been warned by Jeffords that "anybody talking union around here" would be fired. Jeffords admitted that he had been aware of Charland's union activity when they met on June 24. Charland testified credibly that, during that meeting, Jeffords had begun cursing at him for having initiated organizing activity behind Jeffords' back; that Jeffords had threatened to close the job before allowing employees to become unionized; and that Jeffords had stated that Charland was "through for good [since] we've got ways of taking care of things like this." These facts establish, at least, a prima facie case that Charland had been terminated because of his distribution of union authorization cards.

As found above, there is no objective support for the various assertions made by Jeffords regarding Charland's performance as a truckdriver, and I do not credit Jeffords's testimony with regard to those matters. Indeed, Jeffords did not deny having told Askren that Charland's driving habits were being used as a "pretense" to discharge him. That admission, coupled with Jeffords' admission to Charland, during their June 24 conversation, that the latter was "through" because he had been campaigning to obtain representation for the employees, constitutes "an outright confession of unlawful discrimination. It eliminated any further question concerning the intrinsic merits . . . of [Charland's discharge]" N.L.R.B. v. L. C. Ferguson and E. F. Von Seggern d/b/a Shovel Supply Company, 257 F.2d 88, 92 (5th Cir. 1958). Respondent argues that its failure to take action against Staples negates any finding of unlawful motivation concerning Charland's termination. "However, it is well established that a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents." Nachman Corp. v. N.L.R.B., 337 F.2d 421, 424 (7th Cir. 1964).

Therefore, I find that Respondent discharged Charland because he had been attempting to organize its employees, thereby violating Section 8(a)(3) and (1) of the Act. Moreover, I credit Charland and Staples and, accordingly, find that Jeffords did interrogate Staples concerning the identities of the employees who were involved in the organizing campaign and did threaten, during his conversation with Charland, to close the job down before allowing the employees to become unionized, thereby violating Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

- 1. Wayne Construction, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. Teamsters Local 959, State of Alaska, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; International Union of Operating Engineers, Local 302, AFL-CIO; and Laborers' International Union of North America, Local 942, AFL-CIO, are each labor organizations within the meaning of Section 2(5) of the Act.
- 3. By interrogating its employees concerning the union activities and sympathies of their coworkers and by threatening to close down the Metlakatla Island breakwater construction job before allowing employees to become unionized, Wayne Construction, Inc., violated Section 8(a)(1) of the Act.
- 4. By discharging Edward Lewis Charland on June 24, 1980, because he was attempting to organize employees, Wayne Construction, Inc., violated Section 8(a)(3) and (1) of the Act.
- 5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Wayne Construction, Inc., engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Inasmuch as the Metlakatla Island breakwater construction project has been completed, the General Counsel has not sought an order reinstating Charland. However, Wayne Construction, Inc., will be required to make Charland whole for any loss of earnings he may have suffered by reason of his unlawful discharge, with backpay to be computed on a quarterly basis, making deductions for interim earnings, as prescribed in F. W. Woolworth Company, 90 NLRB 289 (1950), plus interest as set forth in Isis Plumbing & Heating Co., 138 NLRB 716 (1962), enforcement denied on different grounds 322 F.2d 913 (9th Cir. 1963), and Florida Steel Corporation, 231 NLRB 651 (1977).

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁸

The Respondent Wayne Construction, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall:

^a In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

- 1. Cease and desist from:
- (a) Interrogating its employees concerning the union sympathies and activities of their coworkers.
- (b) Threatening to close down projects before allowing its employees to become unionized.
- (c) Discharging or otherwise discriminating against its employees with regard to hire or tenure of employment or any term or condition of employment for engaging in activities on behalf of labor organizations, or for engaging in activities protected by Section 7 of the Act.
- (d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights protected by Section 7 of the Act.
- 2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:
- (a) Make Edward Lewis Charland whole for any loss of pay he may have suffered as a result of his discriminatory discharge on June 24, 1980, in the manner set forth above in "The Remedy" section of this Decision.
- (b) Preserve and make available to the Board and its agents all payroll and other records necessary to compute the backpay rights set forth in "The Remedy" section of this Decision.
- (c) Post at its Seattle, Washington, facility copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Wayne Construction, Inc., to insure that said notices are not altered, defaced, or covered by any other material. In addition, Wayne Construction, Inc., shall mail one copy of the attached notice to each employee who was employed by it on the Metlakatla Island, Alaska, breakwater construction site from June 24, 1980, until completion of that project, upon receipt thereof from the Regional Director for Region 19.
- (d) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

⁹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."